-1404

APR 17 1973

MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-1404

JEAN MURRELL CAPERS, *et al.*,
Petitioners,

v.

CUYAHOGA COUNTY BOARD OF ELECTIONS, ROBERT E. HUGHES, JOHN J. CARNEY, JOSEPH BARTUNEK and SAUL G. STILLMAN, AS THE BOARD OF ELECTIONS OF CUYAHOGA COUNTY, OHIO,
Respondents.

PETITION FOR WRIT OF CERTIORARI
To the United States Court of Appeals
For the Sixth Circuit

JACK M. SCHULMAN
730 Standard Building
Cleveland, Ohio 44113
Counsel for Petitioners

THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO—TEL. (216) 621-0647

TABLE OF CONTENTS

OPINIONS OF THE COURT BELOW ---------- 2

JURISDICTION ---------- 2

QUESTIONS PRESENTED ---------- 2

STATEMENT OF THE CASE ---------- 3

REASONS RELIED UPON FOR ALLOWANCE OF THE WRIT ---------- 8

I. The Court of Appeals Erred in Refusing to Dismiss the Board's Appeal, Because an Order Which Does Nothing Other Than Tax Costs Is Not Appealable, Except Where the District Court's Power to Tax the Disputed Item Is At Issue ---------- 8

II. The Court of Appeals Erred In Refusing to Dismiss the Board's Appeal, Since the Substantive Issues in This Case Were Moot, and the Appeal Related Solely to an Issue of Costs ---------- 11

III. The Court of Appeals Applied an Improper Standard in Determining the Recoverability of Attorney Fees in a Suit Under Title 42, U.S.C.A., Sections 1981 and 1983 ---------- 12

TABLE OF CITATIONS

Cases

Alton and So. Ry v. International Association of Machinists and Aerospace Workers, 463 F.2d 872 (D.C., Cir., 1972) ---- 12

Bank of Marin v. England, 385 U.S. 99 (1966) ---- 11

Bradley v. School Board of City of Richmond, 345 F.2d 310 (4th Cir., 1965) ---- 12-13

Brown v. Board of Education, 347 U.S. 438 (1954) ---- 13

Heitmuller v. Stokes, 256 U.S. 359 (1921) ---- 11, 12

Hill v. Whitlock Oil Services, Inc., 450 F.2d 170 (10th Cir., 1971) ---- 10

Inter-Type Corporation v. Clark-Congress Corporation, 249 F.2d 626 (2nd Cir., 1957) ---- 9, 10

Knight v. Auciello, 453 F.2d 852 (1st Cir., 1972) ---- 14, 19

Monroe, et al. v. Board of Commissioners, et al., 453 F.2d 259 (6th Cir., 1972) ---- 6, 13

N.A.A.C.P. v. Allen, 340 F. Supp. 703 (M.D. Ala., 1972) ---- 16

Newton v. Consolidated Gas Company, 265 U.S. 78 (1924) ---- 8, 10

Sims v. Farr, 340 F. Supp. 691 (M.D. Ala., 1972) ---- 14

U.S. v. Arizona Canning Company, 212 F.2d 532 (10th Cir., 1954) ---- 11

U.S. v. 2,186.63 Acres of Land, 464 F.2d 676 (10th Cir., 1972) ---- 10

Wetzel v. Ohio, 371 U.S. 62 (1962) ---- 9, 10, 11, 12

Treatise

6 MOORE'S FEDERAL PRACTICE, Paragraph 54. 70(5) ..11, 12

Statute

Civil Rights Act of 1964, 42 U.S.C.A., Section 2000 a-3(b) ---------- 12

Title 42 U.S.C.A., Sections 1981, 1982, and 1983 ---------- 12, 13, 14, 19

In the Supreme Court of the United States

OCTOBER TERM, 1972

No. _____

JEAN MURRELL CAPERS, *et al.*,
Petitioners,

v.

CUYAHOGA COUNTY BOARD OF ELECTIONS, ROBERT E. HUGHES, JOHN J. CARNEY, JOSEPH BARTUNEK and SAUL G. STILLMAN, AS THE BOARD OF ELECTIONS OF CUYAHOGA COUNTY, OHIO,
Respondents.

PETITION FOR WRIT OF CERTIORARI
To the United States Court of Appeals
For the Sixth Circuit

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioners, Jean Murrell Capers and Brunson A. Ballard, respectfully pray that a Writ of Certiorari issue to review the decisions of the United States Court of Appeals for the Sixth Circuit, entered in the above-entitled matter on September 27, 1972 and January 17, 1973.

OPINIONS OF THE COURT BELOW

The opinion of the District Court for the Northern District of Ohio, Eastern Division, is unreported (Appendix A). The opinion of the Court of Appeals for the Sixth Circuit is also unreported (Appendix C).

JURISDICTION

The final judgment of the Court of Appeals was entered January 17, 1973. The jurisdiction of this Court is invoked under Title 28 U.S.C.A., Section 1254(1).

QUESTIONS PRESENTED

(1) Is a District Court's order which does nothing other than tax costs appealable for error alone, where the power of the District Court to tax the disputed item is not at issue?

(2) Where the substantive issues in a case have become moot, is the case appealable solely on an issue of costs?

(3) Are the plaintiff's attorneys fees taxable as costs in a Civil Rights case where the plaintiff has benefited a substantial number of persons and effectuated a strong congressional policy?

(4) What is the proper standard for determining the recoverability of plaintiff's attorneys fees in Civil Rights litigation?

STATEMENT OF THE CASE

The petitioners are Mrs. Jean Murrell Capers and Brunson Ballard. Mrs. Capers was a candidate for mayor of the City of Cleveland in the 1971 elections. Mr. Ballard is a qualified voter who desired to vote for Mrs. Capers. The defendant-appellees are the Cuyahoga County Board of Elections and its members.

For as long as anyone can remember, nominating petitions for mayor of Cleveland had to be filed on or about June 29th of the election year. The Cleveland City Charter regulates municipal elections, and it provides for a general election early in November, preceded by a primary election at the end of September. The procedure designated by the Charter has been in effect for many years, and the practice was always the same.

Although nominating petitions must be filed in the summer, the campaign for mayor in Cleveland begins long before that. This is particularly true with respect to independent candidates for mayor, since the law requires that they submit nominating petitions containing two and one-half times as many signatures as the nominating petitions of party candidates. (Charter, Section 4; Section 3513.252, Ohio Revised Code.)

The Board of Elections is charged with the responsibility of conducting all elections held in Cuyahoga County. It has no authority however, to determine the dates on which these elections will be held or the dates on which petitions must be filed. Those dates are designated solely by statute and ordinance. The director of the Board of Elections, however, prepares a "calendar" each year for the convenience of Board employees and interested persons who might inquire. This calendar is a simple list of the elections to be held within the county in that year, together with the date on which the election for each office will be held and the date on which nominating petitions

must be filed. The calendar is not an official document in any sense, and is really just a summary of pertinent election information.

Pursuant to his customary practice, the director prepared such a calendar in December, 1970, covering the year 1971. The calendar was used to answer questions from candidates and other interested persons who inquired at the Board's offices, and it was used as a source of information by the newspapers for various articles reporting the election race.

In January, 1971, Mrs. Capers determined that she would run for Mayor of Cleveland as an independent candidate. Mrs. Capers, a black woman, was only the second candidate to announce and was an early declarant by Cleveland standards. She made her announcement early, because she knew the race would be difficult, and she knew that independent candidates have to obtain a large number of signatures on their nominating petitions.

Around the middle of January, 1971, Mrs. Capers called the Board of Elections to find out if she could obtain petitions for circulation. She was also seeking to determine what was the last date for filing the petitions. The Board officials told Mrs. Capers that nominating petitions were not yet available at the Board offices, since they had not been printed. Mrs. Capers was told not to worry, since she had until June 29th to file. The Board officials told her to call back in a few weeks.

Around February 8th, Mrs. Capers again called the Board to see if nominating petitions were available. This time she spoke to the Director of the Board of Elections. He advised her that petitions were still not available, but that she should not be concerned, since she had plenty of time before June 29th within which to secure signatures.

Around two weeks later (March 1st), Mrs. Capers again called the Board of Elections to find out whether

petitions were available. She was told that petitions were now available. She went down to the Board offices that day, took out petitions, and began circulating them.

Another independent candidate, Stephen Deubel, had been making similar inquiries during this period. He was also told that petitions were not available, but eventually he secured them.

During this period other prospective candidates were jockeying for position and planning their strategy. Among these prospective candidates was James Carney, whose brother, John Carney, was one of the four members of the Board of Elections. James Carney eventually announced his candidacy and won the Democratic nomination, although he was defeated at the general election.

The two Republican co-chairmen were also members of the Board of Elections. They considered their best candidate to be Ralph Perk. Indeed, that later proved to be the case, and Mr. Perk was elected Mayor.

Both the Republicans and Democrats considered it to their political advantage to bar independent candidates from the election. Both political parties were concerned that Carl Stokes, who was then mayor, or another black candidate would run for mayor as an independent. In that event it would be likely that the two established parties would divide the "white vote", which constitutes approximately sixty percent (60%) of the Cleveland electorate, thereby losing the election to Stokes or another black candidate. Thus, it was to the advantage of both established parties to prevent independent candidates from getting on the ballot for the 1971 elections.

The problem facing the political leaders on the Board of Elections was how to accomplish such a removal of all independent candidates from the 1971 mayoral ballot. As later events have revealed, the Board members determined that they would stretch and contort the provisions

of the various statutes to require that independent candidates must file their petitions nine months before an election, and to make this ruling retroactive so as to exclude all independent candidates from the 1971 election.

On April 12, 1971, the Board of Elections, without any prior notice, announced that all independent candidates for Mayor of Cleveland should have filed their nominating petitions by February 3, 1971, i.e., two months before. This action effectively barred all independent candidates from the ballot, since no one had any reason to expect that the Board would make such a ruling, and since petitions *were not even available for circulation until March 1st.* That action by the Board of Elections became the subject of this litagation.

After hearing evidence of what the Board had done, the District Court castigated the Board of Elections for its actions and ordered the Board to accept nominating petitions for independent candidates on the same basis as party candidates. The Court also ordered the plaintiffs' attorney fees to be taxed as costs. The Board did not appeal the District Court's ruling on the merits of the case. It did, however, appeal the order taxing attorney fees.

The trial court issued only a brief memorandum on the matter of attorney fees. During the period in which the appeal was pending, the Sixth Circuit Court of Appeals decided the case of *Monroe, et al. v. Board of Commissioners, et al.*, 453 F.2d 259 (6th Cir., 1972), in which it held that findings of fact and conclusions of law should be made in cases where attorney fees are allowed. The Court of Appeals therefore vacated the District Court's order granting attorney fees and remanded the matter back to the District Court for findings of fact and conclusions of law. At the request of the defendants, the District Court judge, the Honorable Thomas D. Lambros,

removed himself from the case and the matter was heard before Chief Judge Frank J. Battisti.

Judge Battisti, after considering the record and hearing the arguments of counsel, issued a Memorandum Opinion and Order on March 6, 1972, granting attorney's fees and ordering them to be taxed as costs[1] (Appendix A). From that order of March 6, 1972, the Board appealed to the Sixth Circuit Court of Appeals.

As we noted above, the Board of Elections never appealed the district court's decision on the merits. The only issue involved in either of the two appeals was the matter of the plaintiffs' attorney fees. While the appeals were still pending, the 1971 mayoral elections were held pursuant to the filing dates specified in the district court's original opinion. Thus, the substantive issues in the case had become moot long before the Court of Appeals ruled.

The sole issue before the Court of Appeals in the Board's appeal from the second order taxing costs (dated March 6, 1972), as expressed in the Board's appellate brief, was as follows:

> "The issue in this case is whether the Cuyahoga County Board of Elections is guilty of such bad faith as to require the trial court to award attorney fees against the said Board of Elections, there being no persistent defiance of law or any obstinate, obdurate conduct on the part of the said board." (Defendant-Appellants' Brief, page 3.)

The plaintiffs moved the Court of Appeals to dismiss the appeal on two grounds:

(1) An order which merely taxes costs is not appealable, except where the power of the district court to tax the disputed item is at issue;

(2) Where the substantive issues in the case are

---

[1] The parties stipulated that the amount of the attorney fee sought to be taxed, $2,160.00, was reasonable.

moot, the courts will not hear an appeal solely on the issue of costs.

The Court of Appeals overruled the motion to dismiss. (Appendix B) Then, in an opinion dated January 17, 1973 (Appendix C), the court reversed the district court's order granting attorney fees, on the ground that the Board's conduct did not exhibit "such wilful and obdurate defiance of law as to warrant the award of attorney fees."

The petitioners seek a writ of certiorari from this Court to review the decisions of the Court of Appeals which overruled their motion to dismiss the appeal and which reversed the district court's order of attorney fees.

REASONS RELIED UPON FOR ALLOWANCE OF THE WRIT

I. The Court of Appeals Erred in Refusing to Dismiss the Board's Appeal, Because an Order Which Does Nothing Other Than Tax Costs Is Not Appealable, Except Where the District Court's Power to Tax the Disputed Item Is At Issue.

As we indicated above, the Board of Elections did not assert that the district court lacked the *power* to tax attorney fees as costs. The Board of Elections merely claimed that the facts in the instant case did not justify the exercise of that power.

Under Federal law, an order which does nothing more than tax costs is not appealable, unless it is claimed that the district court lacked the power to tax those disputed items as costs. The principal decision articulating this rule is *Newton v. Consolidated Gas Company*, 265 U.S. 78 (1924):

> "Is the order of the order of the District Court for this controverted item appealable? There is no doubt that, as a general rule, an appeal does not lie

from a decree solely for costs, and if any appeal on the merits be taken and affirmed, it will not be reversed on a question of costs. *Canter v. American Insurance Company,* 3 Pet. 307, 319; *Elastic Fabrics Company v. Smith,* 100 U.S. 110, 112; *Paperbag Cases,* 105 U.S. 776, 772; *City Bank of Fort Worth v. Hunter,* 152 U.S. 512, 516; *Stuart v. Boulware,* 133 U.S. 78; *DuBois v. Kirk,* 158 U.S. 58, 67; *Citizens' Bank v. Cannon,* 164 U.S. 319, 323, *Wingert v. First National Bank,* 223 U.S. 670, 672 . . .

"The rule forbidding appeals from decrees for costs only is easily deducible from the discretion in the trial court in fixing them and the better opportunity of that court to exercise that discretion from its greater inticimacy with details of the pleadings, hearings, and orders in the case. When the power of the court to assess costs against either party is not in dispute, or the mere amount to be fixed is in issue, appeals on such questions alone are not allowed. But the role is not absolute and should not be enforced to assess as costs against a fund or a party expenditures of a class not legally assessable as such. Where a question of this kind is made, appeals have been allowed." 265 U.S. at 82-83. See also *Wetzel v. Ohio,* 371 U.S. 62 (1962).

The rule is also discussed in *Inter-Type Corporation v. Clark-Congress Corporation,* 249 F.2d 626 (2nd Cir.) at 628:

"Inter-type first contends that an appeal does not lie from an order assessing costs. Certainly, as a general rule, such an assertion is well-founded when the question presented does not concern the *power* to act. *Wingert v. First National Bank,* 223 U.S. 670, 672, 32 S. Ct. 391, 56 L. Ed. 605; *City National Bank of Fort Worth v. Hunter,* 152 U.S. 512, 516, 14 S. Ct. 675, 38 L. Ed. 534; *Stuart v. Boulware,* 133 U.S. 78, 82, 10 S. Ct. 242, 33 L. Ed. 568; *Paper-Bag Cases,* 105 U.S. 766, 772, 26 L. Ed. 959; *Kemart Corporation v. Printing Arts Research Lab.,* 9 Cir. 232 F.2d 897. However,

the rule does not apply when the *power* or *right* of the court to assess certain items of cost is in dispute. As the court said, in *Williams v. Sawyre Bros.*, 2 Cir., 51 F.2d 1004, 81 A.L.R. 1527; 'We have recently held in a suit in the admiralty (*New Jersey Shipbuilding and Dredging Company, v. James McWilliams Blue Line*, 2 Cir., 49 F.2d 1926), that there can be no appeal whose only purpose is to challenge the priority of an award of costs at least unless the power of the court be at issue. The abuse of the court's discretion was in that case clear, but the appeal involved no question as to the legality of any of the items taxed. *The contrary is true here; nobody disputes the defendant's right to costs, but the question arises as to what items can lawfully be included. Upon that question an appeal lies to this court. Newton v. Consolidated Gas Company*, 265 U.S. 78, 83, 84, 44 S. Ct., 481, 68 L. Ed. 909.' (Emphasis supplied.) Inasmuch as the issue before us concerns the power of the district court to act, we conclude that the general rule is inapplicable and that this appeal is properly before us." (emphasis is the court's own)

The Board of Elections did not claim that the district court lacked the power to tax attorney fees as costs. The Board merely asserted that, under the circumstances of this case, the district court erred in doing so. An order taxing costs is not appealable on such limited grounds.

The decision of the Court of Appeals in refusing to dismiss the Board's appeal is inconsistent with this Court's decisions in *Newton v. Consolidated Gas Company, supra* and *Wetzel v. Ohio, supra.* And, it is inconsistent with the following decisions of the other Courts of Appeal:

(1) *U.S. v. 2,186.63 Acres of Land*, 464 F.2d 676 (10th Cir., 1972)

(2) *Hill v. Whitlock Oil Services, Inc.*, 450 F.2d 170 (10th Cir., 1971)

(3) *Inter-Type Corporation v. Clark-Congress Corporation*, 249 F.2d 626 (2nd Cir., 1957)

(4) *U.S. v. Arizona Canning Company*, 212 F.2d 532 (10th Cir., 1954)

In the instant case, the Court of Appeals ruled that an order which does nothing other than tax costs is appealable for error alone.

II. The Court of Appeals Erred In Refusing to Dismiss the Board's Appeal, Since the Substantive Issues in This Case Were Moot, and the Appeal Related Solely to an Issue of Costs.

In the instant case, all substantive issues between the parties became moot in 1971. August 18th, 1971, which the district court determined to be the proper filing date for all candidates for mayor of Cleveland, has long since passed. No one disputes the correctness of the district court's decision in setting that filing date. The Board did not appeal from that decision. In addition, Mrs. Capers, is no longer a candidate for mayor. Because of the cloud which the Board of Elections cast over her candidacy, people were unwilling to sign her petitions. They felt they would be wasting their signature, since it was doubtful that she would be permitted on the ballot. As a result, Mrs. Capers was unable to secure enough signatures on her petitions and was ruled off the ballot.

Obviously, as far as the merits of this case are concerned, the action is moot. Under Federal law, the appellate courts will not decide an appeal of a case which has become moot, where the only issue between the parties is that of costs: "Where no controversy remains except as to costs, this court will not pass upon the merits." *Heitmuller v. Stokes*, 256 U.S. 359 at 362 (1921); see also *Wetzel v. Ohio*, 371 U.S. 62 (1962) *Bank of Marin v. England*, 385 U.S. 99 (1966) dissent of Justice Fortas at 111, Fn. 1, and cases cited therein; 6 MOORE'S FED. PRAC.,

Par. 54. 70(5) at 1311: *Alton and So. Ry. v. International Association of Machinists and Aerospace Workers,* 463 F. 2d 872 (D.C. Cir., 1972).

As the record indicates, the substantive issues in this litigation became moot in 1971. Where the substantive issues in a case have become moot, no appeal lies merely on the matter of costs. Thus, the Court of Appeals erred in considering an appeal solely on the issue of costs. In doing so, its decision conflicted with several decisions of this Court, among them *Heitmuller v. Stokes,* 256 U.S. 359 (1921) and *Wetzel v. Ohio,* 371 U.S. 62 (1962). The Court of Appeals's decision was erroneous.

III. The Court of Appeals Applied an Improper Standard in Determining the Recoverability of Attorney Fees in a Suit Under Title 42, U.S.C.A., Sections 1981 and 1983.

The question of whether the plaintiff's attorney fees may be taxed as costs in a Civil Rights case has been the subject of considerable litigation. The Civil Rights Act of 1964 includes its own provision regulating this matter (42 U.S.C.A., Section 2000 a-3(b)). Most of the litigation, however, has concerned Title 42, U.S.C.A., Sections 1981, 1982, and 1983. While there have been many lower court cases considering this issue, the Supreme Court has never specifically decided the matter of what standard is to be applied.

Lower court decisions as to the applicable standard in allowing attorney fees are not consistent. In school desegregation cases, the general rule has been that attorney fees are appropriate ". . . only when it is found that the bringing of the action should have been unnecessary and was compelled by the school board's unreasonable, obdurate obstinancy," *Bradley v. School Board of City of*

Richmond, 345 F.2d 310 (4th Cir., 1965) at 321. We believe that this rather restrictive rule derives from the fact that since *Brown v. Board of Education*, 347 U.S. 438 (1954), school boards have been under *an affirmative duty* to proceed to desegregate. Given this unusual situation, in an area where complex educational problems lead to disagreements over methods even among persons in good faith, a limited rule of attorney fees is understandable.

The Sixth Circuit, however, has adopted the school desegregation rule for *all* cases brought under Sections 1981 and 1983. See: *Monroe v. Board of Commissioners*, 453 F.2d 259 (6th Cir., 1972). It was that rule which was applied in the instant case.

Other federal courts have adopted a more liberal rule for attorney fees in *non*-desegregation cases. Generally, these decisions have been based upon five considerations:

(1) The civil rights statutes advance an important federal and constitutional policy.

(2) Plaintiffs in civil rights cases are, in a sense, "private attorneys-general," enforcing and advancing this strong policy.

(3) The judicial decisions secured by the plaintiffs who bring these civil rights cases generally benefit a large number of individuals in addition to the plaintiffs themselves.

(4) Damages are generally not available to the plaintiff in a civil rights case, and therefore, either the plaintiff or his attorney must bear the entire burden of enforcing the congressional policy and of securing a substantial benefit to others.

(5) Unless attorney fees are allowed in such cases, the commencement of such litigation will be discouraged, thereby frustrating the congressional policy behind the statutes.

Three lower court decisions have discussed this matter extensively:

Knight v. Auciello, 453 F.2d 852 (1st Cir., 1972) was a case under Section 1982 involving the refusal to lease an apartment. With respect to attorney fees, the court said:

> "The violation of an important public policy may involve little by way of actual damages, so far as a single individual is concerned, or little in comparison with the cost of vindication, as the case at bar illustrates. If a defendant may feel that the cost of litigation, and particularly, that the financial circumstances of an injured party may mean that the chances of suit being brought, or continued in the face of opposition, will be small, there will be little brake upon deliberate wrongdoing. In such instances public policy may suggest an award of costs that will remove the burden from the shoulders of the plaintiff seeking to vindicate the public right. We regard this as such a case." 453 F.2d at 853

Sims v. Farr, 340 F. Supp. 691 (M. D. Ala., 1972), was a reapportionment case. The court said:

> "As to plaintiffs' motion for an allowance of attorneys' fees, the rule is well settled that such an award may be made in the exercise of the equity powers of the court. See, e.g., *Sprague v. Ticonic Bank,* 307 U.S. 161, 166, 59 S.Ct. 777, 83 L. Ed. 1184, et seq. (1939); *Dyer v. Love,* 307 F. Supp. 974 (N.D. Miss. 1969); 6 *Moore's Federal Practice,* paragraph 54. 77(2). Each case must be decided according to its own peculiar facts. Defendants contend, of course, that the facts in the present suit do not justify the award. They argue primarily that they have not been arbitrary, unreasonable, or obdurately obstinate with regard to reapportionment or with regard to the defense of this lawsuit, and that in the absence of bad faith, a grant of attorneys' fees is unwarranted. As plaintiffs have demonstrated, however, this argument,

as it relates to the Legislature, is devoid of any factual basis. The history of the present litigation is replete with instances of the Legislature's neglect of, and even total disregard for, its constitutional obligation to reapportion . . .

"In addition to the Legislature's inaction as a factor which necessitated this suit, the submissions of obviously unacceptable plans by other of the defendants also could be characterized as acts of bad faith which contributed to the expense of litigation. See *Bradley v. School Board of Richmond*, 53 F.R.D. 28 (E.D. Va., 1971). Nevertheless, a finding of bad faith is not always a prerequisite to the taxing of attorneys' fees against defendants, and in this case, despite the availability of that ground, the Court has decided to base its award on far broader considerations of equity.

"In instituting the case *sub judice*, plaintiffs have served in the capacity of 'private attorneys general' seeking to enforce the rights of the class they represent. See generally *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400, 88 S. Ct. 964, 19 L. Ed. 2d 1263 (1968); *Miller v. Amusement Enterprises, Inc.*, 426 F.2d 534 (5th Cir., 1970). If, pursuant to this action, plaintiffs have benefited their class and have effectuated a strong congressional policy, they are entitled to attorneys' fees regardless of defendants' good or bad faith. See *Mills v. Electro Auto-Lite Company*, 396 U.S. 375, 90 S. Ct. 616, 24 L. Ed. 2d 593 (1970). Indeed, under such circumstances, the award loses much of its discretionary character and becomes a part of the effective remedy a court should fashion to encourage public-minded suits, id., and to carry out congressional policy. *Lee v. Southern Home Sites*, 444 F.2d 143 (5th Cir., 1971) . . .

"Despite the benefit to plaintiffs' class, however, and despite this suit's effectuating the purposes of congressional legislation, the case *sub judice* is one most private individuals would hesitate to initiate and

litigate. Circumstances described in *Bradley* as rendering school desegregation suits unattractive to prospective plaintiffs apply with equal force to reapportionment cases:

'. . . No substantial damage award is ever likely, and yet the costs of proving a case for injunctive relief are high. To secure counsel willing to undertake the job of trial, including the substantial duty of representing an entire class . . . necessarily means that someone—plaintiff or lawyer—must make a great sacrifice unless equity intervenes. . . .

"Consequently, in order to attempt to eliminate these impediments to *pro bono publico* litigation, such as is here involved, and to carry out congressional policy, an award of attorneys' fees is essential." 340 F.Sup. 692-695.

N.A.A.C.P. v. Allen, 340 F. Supp. 703 (M.D. Ala., 1972), was a suit relating to employment policies in the Alabama highway patrol. In connection with the issue of attorney fees, the court made the following observations:

"Because defendants have not contested their liability for the usual items of costs, this Court proceeds to plaintiffs' prayer for attorneys' fees. Defendants acknowledge that the Court may, in the exercise of its equity powers, grant such relief. See, e.g., *Sprague v. Ticonic Bank*, 307 U.S. 161, 59 S. Ct. 777, 83 L.Ed. 1184 (1939); *Morrow v. Crisler*, C.A. No. 4716 (S.D. Miss., Sept. 29, 1971). They argue, however, that an award of attorneys' fees is unwarranted in this case because they have attempted in good faith, albeit unsuccessfully, to hire black troopers. This contention is not supported by the evidence. Plaintiffs have demonstrated and this Court has noted that in the thirty-seven year history of the Alabama Trooper organization there has never been a black trooper, and the only Negroes ever employed by the department have been nonmerit system laborers. *NAACP v. Allen*, 340 F. Supp. 703 (M.D. Ala., 1972). Such

statistics, far from being compatible with defendants' claim of good faith, constitute a substantial showing by plaintiffs of bad faith on the part of defendants and their predecessors in office. In addition, because the constitutional principles applicable to the case *sub judice* were clear long before this suit was filed, see, e.g., *Burton v. Wilmington Parking Authority*, 365 U.S. 715, 81 S.Ct. 856, 6 L.Ed.2d 45 (1961); *Brown v. Board of Education*, 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873 (1954); *Morrow v. Crisler, supra*, and because defendants unquestionably knew and understood that their discriminatory practices violated the Fourteenth Amendment to the United States Consitution, *see United States v. Frazer*, 317 F. Supp. 1079 (M.D. Ala., 1970), their defense of this lawsuit amounts to unreasonable and obdurate conduct which necessitated the expense of litigation. Consquently, because of defendants' bad faith, this case is an appropriate one for the awarding of a reasonable attorneys' fee.

"This Court, however feels that the attorneys' fee award should be premised on a broader basis than defendants' bad faith. When plaintiffs, through the prosecution of a lawsuit, benefit the class they represent and effectuate a strong congressional policy, they are entitled to attorneys' fees regardless of defendants' good or bad faith. *Mills v. Electro Auto-Lite Company*, 396 U.S. 375, 90 S.Ct. 616, 24 L.Ed. 2d 1263 (1968); *Miller v. Amusement Enterprises, Inc.*, 426 F.2d 534 (5th Cir., 1970). Indeed, under such circumstances, the award loses much of its discretionary character and becomes a part of the effective remedy a court should fashion to encourage public-minded suits and to carry out congressional policy. See: *Lee v. Southern Home Sites*, 444 F. 2d 143 (5th Cir., 1971); *Sims v. Amos*, 340 F. Supp. 691 (M.D. Ala., 1972) (three-judge court) . . .

"In addition, congressional policy strongly favors the vindication of federal rights violated under color of state law, 42 U. S. C. paragraph 1983, and, more

specifically, the enforcement and protection of the right to equal job opportunities, 42 U. S. C. paragraphs 2000e, 2000e-1 to 2000e-15. Surely, this congressional policy is as compelling as that embodied in 42 U. S. C. paragraph 1982 and given effect by an award of attorneys' fees in *Lee v. Southern Home Sites, supra.* Consequently, because the benefit to plaintiffs' class is significant, and because, in bringing this suit, plaintiffs have promoted the purposes of congressional legislation, the case *sub judice* clearly falls among those meant to be encouraged under the principles articulated in *Piggie Park Enterprises, Inc.*, and *Mills* and expanded upon in *Southern Home Sites* and *Bradley v. School Board of Richmond,* 53 F.R.D. 28 (E.D. Va., 1971). See *Sims v. Amos, supra.*

"Other circumstances also render an allowance of attorneys' fees appropriate. The prosecution of the kind of case involved here, like that of the desegregation suits described in *Bradley,* 'is an enterprise on which any private individual should shudder to embark.' 53 F. R. D. at 40. Because the probability of a large damage recovery is remote, absent court-awarded attorneys' fees, plaintiffs or their lawyers who bring class actions seeking to preserve civil liberties usually must make substantial financial sacrifices. In addition, a lawyer representing black plaintiffs in an employment discrimination case, or in any civil rights litigation, is likely to suffer social, political and community ostracism. This likelihood is multiplied, of course, in a case such as the present one in which plaintiffs have sued high-ranking state officials and have alleged and proved racial discrimination. Even more damaging to an attorney involved in such litigation is the probability that he will be estranged from other members of his profession who are unwilling to participate in, or even lend moral support to, suits seeking to vindicate the public good. Because of these factors and the paucity of damage awards in civil rights suits, private plaintiffs and lawyers generally spurn involvement with them. Consequently, as

pointed out in *Sims v. Amos,* in order to encourage *pro bono publico* litigation and to carry out congressional policy, an award of attorneys' fees is essential." 340 F. Supp. 708-710.

The decisions in the three cases from which the above quotations have been taken are inconsistent with the rule applied in the Sixth Circuit. The Sixth Circuit requires a showing of *bad faith* on the part of the defendants as a precondition to an award of atorney fees in *all* civil rights cases.

The Supreme Court has never spoken directly on this issue. It should be apparent that the major source of enforcement for Sections 1981, 1982, and 1983 is private suits by parties who have been injured. The basic issue before the Court in the within appeal is whether such litigation is to be encouraged or frustrated; whether the rule in the Sixth Circuit will continue, thereby discouraging such litigation, or whether the rule in *Knight v. Auciello* and related cases should be applied. This issue is certainly a significant one, not merely to the litigants in this case, but to everyone. It is clearly a question deserving of this Court's attention, and for that reason we request the Court to hear this case and decide the matter.

Respectfully submitted,

JACK M. SCHULMAN
SCHULMAN & SCHULMAN
730 Standard Building
Cleveland, Ohio 44113
621-0580
Attorney for Petitioners

APPENDIX A

Opinion and Order of District Court

(March 6, 1972)

No. C 71-573
UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

JEAN MURRELL CAPERS, *et al.*,
Plaintiffs,

v.

CUYAHOGA COUNTY BOARD OF ELECTIONS, *et al.*,
Defendants,

MEMORANDUM OPINION AND ORDER

On June 8, 1971, the Honorable Thomas D. Lambros rendered an opinion from the bench finding that the actions of the defendants on April 12, 1971 in modifying the date for filing nominating petitions by independent candidates for the office of the Mayor of the City of Cleveland from June 29, 1971, to February 3, 1971 deprived the plaintiffs of equal protection of the laws and violated their right of association. A written opinion was filed on June 18, 1971. Thereafter, the plaintiffs moved to tax attorney fees as costs. Judge Lambros granted the request and taxed $2,160.00 in attorney fees as costs. The defendants appealed the award of attorney fees; and the Court of Appeals for the Sixth Circuit, on February 23, 1972, vacated the award and remanded the matter for findings of fact and conclusions of law in support of the award. A hearing was scheduled for March 1, 1972 with respect to the order of the Court of Appeals.

On March 1, 1972, counsel appeared in open court before Judge Lambros on this matter. Counsel for the defendants, Mr. John Dowling, at that time made a motion. He requested that Judge Lambros disqualify himself from the proceedings. Judge Lambros properly did so. Judge Lambros requested the Clerk of Courts that the matter be reassigned to another judge. It was done, and the matter was reassigned to this Court.

On March 2, 1972, this Court conducted a hearing relative to the taxing of attorney fees as costs. The Court has heard the arguments of counsel, has reviewed the transcript of the initial proceedings, and has considered all the documents in the file. Concurring in the judgment of Judge Lambros, the Court concludes that an award of attorney fees is indicated. The record clearly reflects bad faith and improperly motivated conduct upon the part of the defendant Board of Elections.

The filing dates for nominating petitions for both partisan and independent mayoral candidates for the City of Cleveland have been identical for a number of years. As defendant Saul Stillman related, it has been the same since at least 1964, the time in which he became a member of the Board of Elections (T. 39, 40). Suddenly the Board on April 12, 1971, in light of this prior consistent course of conduct, altered the dates. There was no apparent reason to do so. There were no discussions prior to April 12, 1971 about the matter (T.45). No elector or candidate requested the Board to clarify the situation, nor does there appear any need for clarification. There was no justification or reason for the Board's action. An inference and finding of bad faith and improper motivation may clearly be made.

The inference and finding are confirmed by additional factors. Well knowing that independent candidates had relied upon the June 29, 1971 date, the Board could have

applied the new date in the next or future elections, but it did not. Rather, the Board specifically made the new filing date retroactive (See resolution of Board adopted April 12, 1971) and, in turn, precluded any independent candidates from being on the ballot. As Judge Lambros stated, "The carpet was pulled from under them . . ." (T. 136).

Further, the basis for their actions, the interpretation of the Charter of the City of Cleveland and the election laws of the State of Ohio is completely indefensible. Their interpretation of the applicable law is an erroneous one. (T.130). In order to reach their intended result, the Board strained, if not contorted, the meaning of the applicable provisions. Judge Lambros put it well when he declared that The Board of Elections of Cuyahoga County has strained the interpretation of the Charter and the state laws beyond reasonable and logical proportion . . ." (T.130).

Combining all of the above, that is the retroactive application of the new filing date, the apparent needlessness to interpret the applicable law, and the strained interpretation of the law, the Court must conclude that the actions of the Board were in bad faith. Their actions were improperly motivated and, evidently, for political reasons. In sum, the Board's actions were inexcusable, and warrant the taxing of attorney fees as costs.

The next question for the Court to consider is the amount of attorney fees to be taxed as costs. Counsel for the plaintiffs has submitted an affidavit in support of the application to tax attorney fees as costs. The affidavit indicates that counsel for the plaintiffs has expended thirty-six (36) hours in the preparation and in the litigation of this lawsuit. Counsel for the plaintiffs has charged for his service at a rate of $60.00 per hour. The plaintiffs, in turn, request that $2,160.00 be taxed as costs. The defendants have agreed that this amount is reasonable.

Accordingly, the Court taxes $2,160.00 as costs in this action.

IT IS SO ORDERED.

/s/ FRANK J. BATTISTI
Chief Justice

APPENDIX B

Order of Court of Appeals Denying Motion to Dismiss

(September 27, 1972)

No. 72-1429

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

JEAN MURRELL CAPERS, *et al.*,

Plaintiffs-Appellees,

vs.

CUYAHOGA COUNTY BOARD OF ELECTIONS, *et al.*,

Defendants-Appellants

ORDER

BEFORE: EDWARDS, MILLER, and MCCREE, Circuit Judges.

The motion to dismiss having come on to be heard, upon consideration, it is ORDERED that the motion be, and it hereby is, DENIED. It is further ORDERED that the appeal be placed on the summary calendar.

APPENDIX C

Opinion of the Court of Appeals

(January 17, 1973)

No. 72-1429

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

JEAN MURRELL CAPERS,

Plaintiff-Appellee,

v.

CUYAHOGA COUNTY BOARD OF ELECTION,

Defendant-Appellant.

APPEAL from the United States District Court for the Northern District of Ohio, Eastern Division.

Before: WEICK, EDWARDS and MCCREE, Circuit Judges.

PER CURIAM. In this case, following a successful suit by plaintiff Capers against the Cuyahoga County Board of Election resulting in a District Court order requiring the Cuyahoga County Board of Election to make provisions for the filing of the petitions allowing candidates independent of major parties to become candidates for mayor of the City of Cleveland in the 1971 mayoralty election, the District Judge found that the Board of Election's overturned action was taken in "bad faith" and awarded attorney's fees to the prevailing attorney in the sum of $2,160.

We indulge no speculation as to what in fact might have been the motivation of the decision of the Board of Election; all we can take into account on this appeal is the

record in this case. On that record the District Judge's finding of "bad faith" is not supported, and as a consequence, must be held to be clearly erroneous.

The record in this case does not warrant a conclusion that the defendant's conduct was such willful and obdurate defiance of law as to warrant the award of attorney's fees here appealed from.

The judgment of the District Court is reversed.

APPENDIX D

Judgment of the Court of Appeals

(January 17, 1973)

No. 72-1429

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

JEAN MURRELL CAPERS,

Plaintiff-Appellee,

VS.

CUYAHOGA COUNTY BOARD OF EDUCATION

Defendant-Appellant.

Before: WEICK, EDWARDS, and MCCREE, Circuit Judges

JUDGMENT

APPEAL from the United States District Court for the Northern District of Ohio.

THIS CAUSE came on to be heard on the record from the United States District Court for the Northern District of Ohio and was argued by counsel.

ON CONSIDERATION WHEREOF. It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby reversed.

It is further ordered that Defendant-Appellant recovers from Plaintiff-Appellee the costs on appeal, as itemized below, and that execution therefor issue out of said District Court.

FILE COPY

FILED
JUN 5 1973
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

October Term, 1972
No. 72-1404

JEAN MURRELL CAPERS *et al.*,
Petitioners,

vs.

CUYAHOGA COUNTY BOARD OF ELECTIONS, ROBERT E. HUGHES, JOHN J. CARNEY, JOSEPH BARTUNEK and SAUL G. STILLMAN, AS THE BOARD OF ELECTIONS OF CUYAHOGA COUNTY, OHIO,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF OF RESPONDENTS IN OPPOSITION

JOHN T. CORRIGAN, *Prosecuting Attorney of Cuyahoga County, Ohio*
JOHN L. DOWLING,
Assistant Prosecuting Attorney of Cuyahoga County, Ohio
Criminal Courts Building
1560 East 21st Street
Cleveland, Ohio 44114
216-771-0660
Attorneys for Respondents

JACK M. SCHULMAN
730 Standard Building
Cleveland, Ohio 44113
216-621-0580
Attorney for Petitioners

THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO—TEL. (216) 621-5647

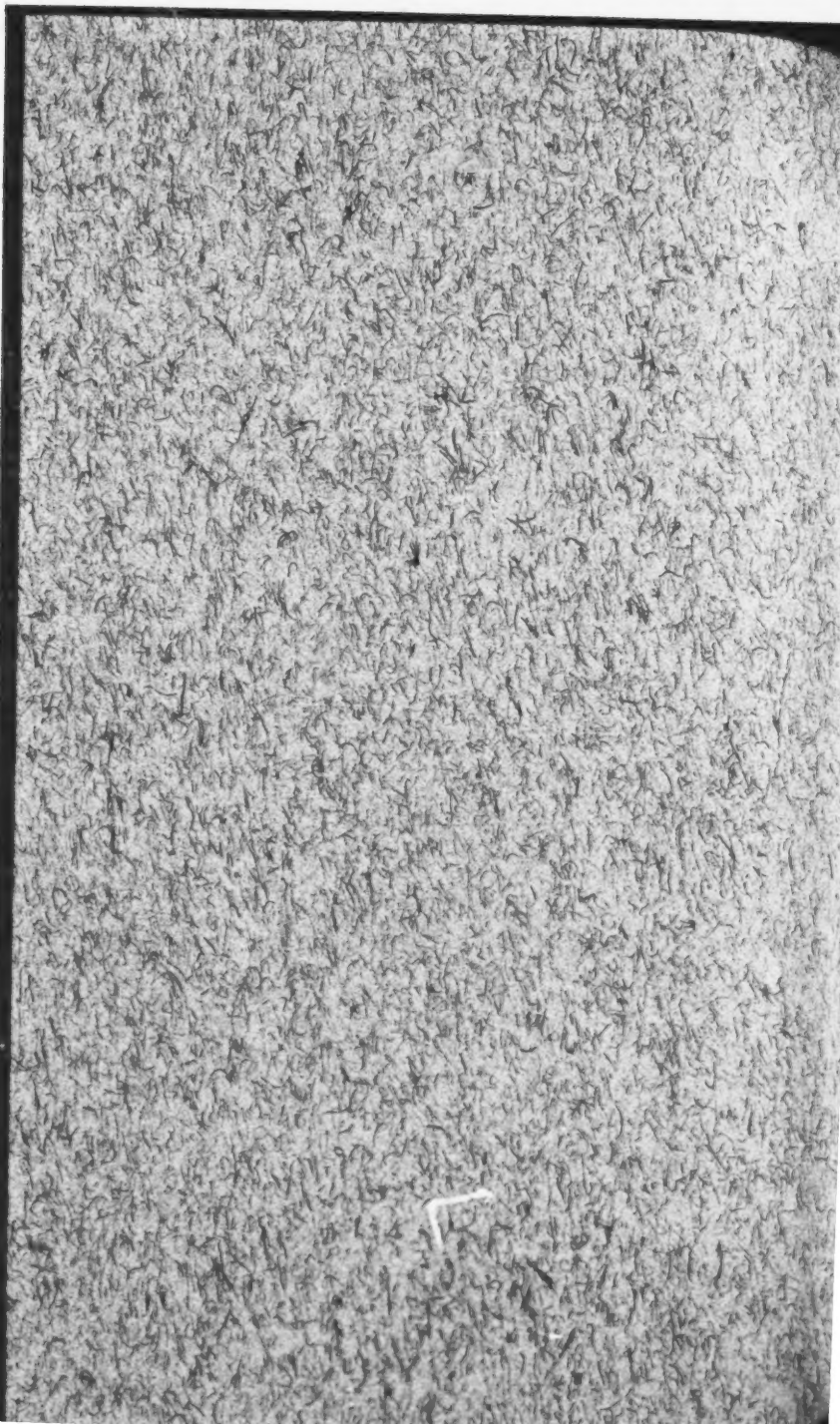

TABLE OF CONTENTS

QUESTIONS PRESENTED 1

STATUTES INVOLVED 2

STATEMENT OF THE CASE 2

ARGUMENT 3

REASONS WHY THE WRIT SHOULD BE DENIED 3

1. The Court of Appeals Properly Entertained the Appeal on the Taxing of Attorney's Fees As Costs, Because the Respondents Challenged the Power of the District Court To Do So under the Facts and Circumstances of This Case 3
2. A Case Is Appealable on the Sole Issue of Costs Where Such Sole Issue Concerns the Power of the Trial Court to Tax Attorney's Fees As Costs 4
3. Attorney's Fees Should Not Be Routinely Awarded in a Case Brought Under Title 28 U.S.C.A., Sections 1331 and 1343, But May Be Awarded Where the Record Establishes Bad Faith or Willful, Obstinate, Obdurate Conduct on the Part of the Defendant 5

CONCLUSION 7

APPENDIX:

Title 28, U.S.C.A., Section 1331 9

Title 28, U.S.C.A., Section 1343 9

Title 42, U.S.C.A., Sections 1981, 1982 and 1983 10

TABLE OF AUTHORITIES

Cases

Adventures in Good Eating v. Good Places to Eat, 131 F.2d 809 (7th Cir. 1942) 4

Association of Western Rys. v. Riss & Co., 320 F.2d 785 (D.C. Cir. 1963) 4

Chicago Sugar Co. v. American Sugar Co., 176 F.2d 1 (7th Cir. 1949) 4

Farmer v. Arabian American Oil Co., 324 F.2d 359 (2d Cir. 1963), *rev'd on other grounds*, 379 U.S. 227 4

Fleischer v. A. A. P., Inc., 36 F.R.D. 31 (S.D. N.Y. 1964) 4

Intertype Corporation v. Clark-Congress Corporation, 249 F.2d 626 (2nd Cir. 1957) 3

Kemart Corp. v. Printing Arts Research Labs, Inc., 232 F.2d 897 (9th Cir. 1956) 4

McKnight v. Akins, 192 F.2d 674 (6th Cir. 1951) 4

Mills v. Electric Auto-Lite Co., 396 U.S. 375 (1970) 6

Newton v. Consolidated Gas Company, 265 U.S. 78 4,5

Texts

6 MOORE'S FEDERAL PRACTICE, Par. 54.70 (5) 3,4

Statutes

28 U.S.C.A. Section 1331 .....1, 2, 3, 5, 6, 9

28 U.S.C.A. Section 1343 .....1, 2, 3, 5, 6, 9

42 U.S.C.A. Section 1981 ..... 5, 10

42 U.S.C.A. Section 1982 .....5, 10

42 U.S.C.A. Section 1983 .....5, 11

In the Supreme Court of the United States

October Term, 1972
No. 72-1404

JEAN MURRELL CAPERS *et al.*,
Petitioners,

vs.

CUYAHOGA COUNTY BOARD OF ELECTIONS, ROBERT E. HUGHES, JOHN J. CARNEY, JOSEPH BARTUNEK and SAUL G. STILLMAN, AS THE BOARD OF ELECTIONS OF CUYAHOGA COUNTY, OHIO,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF OF RESPONDENTS IN OPPOSITION

QUESTIONS PRESENTED

(1) Is a District Court's order taxing attorney's fees as costs appealable where the power to tax under the facts and circumstances of the particular case is challenged?

(2) Where the sole remaining issue in a case is the power of the District Court to tax attorney's fees as costs, is such a case appealable on that sole issue?

(3) Are attorney's fees, taxable as costs, to be routinely awarded to every successful plaintiff who brings an action under Title 28, U.S.C.A., Sections 1331 and 1343, regardless of a failure to show bad faith or willful, obdurate, obstinate conduct on the part of the defendants?

STATUTES INVOLVED

The plaintiffs invoked the jurisdiction of the District Court under the provisions of Title 28, U.S.C.A., Sections 1331 and 1343, which are set forth in the Appendix.

STATEMENT OF THE CASE

Although Rule 40 (2) (e) of this Court, requiring a concise statement of the case does not explicitly limit a party to the record in the trial court, the respondents assume such a stricture to be implied as a part of proper appellate procedure.

If the respondents' assumption is correct, the allowance by this Court of a writ of certiorari based upon the petitioners' statement of the case would be improvident. The material set forth in the second, third, and fourth full paragraphs on page 5 of the petition and the material beginning in the last paragraph of page 5 and concluding at the end of the fourth line of page 6 does not appear anywhere in the record of this case.

For a complete picture of the circumstances in which attorney's fees were awarded, it may be noted, as the *record*, will show that District Judge Battisti simultaneously adjudicated respondents' counsel, John L. Dowling, Assistant Prosecuting Attorney, in contempt of court and imposed a heavy fine as a result of counsel's request to Judge Lambros to step out of the case. This judgment was also reversed by the Sixth Circuit Court of Appeals on January 17, 1973.

ARGUMENT

REASONS WHY THE WRIT SHOULD BE DENIED

1. The Court of Appeals Properly Entertained the Appeal on the Taxing of Attorney's Fees As Costs, Because the Respondents Challenged the Power of the District Court to Do So under the Facts and Circumstances of This Case.

It has consistently been the position and contention of the respondents that the District Court lacked the *power* to assess attorney's fees as costs against them where the respondents are not guilty of bad faith or of willful, obstinate, obdurate conduct (*p. 7 of Petition*). Stated another way, it is asserted that a mere technical violation of the principles enunciated in Title 28, U.S.C.A., Sections 1331 and 1343, does not confer upon the court the authority to assess attorney's fees in the absence of a provision therefor by statute.

The principle is stated explicitly in Syllabus 1, of *Intertype Corporation v. Clark-Congress Corporation*, 249 F.2d 626 (2nd Cir. 1957):

> "Generally, an appeal does not lie from order assessing costs when question presented does not concern power to act, but such rule does not apply when *power or right of court to assess certain items of cost* is in dispute." (Emphasis added.)

Numerous cases have held that an appeal from an award of costs will lie not only in those cases in which the power of the court to assess particular items as costs is in issue, but also in those cases in which there has been an abuse of discretion. 6 MOORE'S FEDERAL PRACTICE, Par. 54.70

(5), cited by petitioners at pp. 11-12. Citations in support of the foregoing proposition are: *McKnight v. Akins,* 192 F.2d 674 (6th Cir. 1951); *Chicago Sugar Co. v. American Sugar Co.,* 176 F.2d 1 (7th Cir. 1949); *Adventures in Good Eating v. Good Places to Eat,* 131 F.2d 809 (7th Cir. 1942); *Kemart Corp. v. Printing Arts Research Labs, Inc.,* 232 F.2d 897 (9th Cir. 1956); *Farmer v. Arabian American Oil Co.,* 324 F.2d 359 (2d Cir. 1963), *rev'd on other grounds,* 379 U.S. 227; *Association of Western Rys. v. Riss & Co.,* 320 F.2d 785 (D.C. Cir. 1963); *Fleischer v. A.A. P., Inc.,* 36 F.R.D. 31 (S.D. N.Y. 1964).

2. A Case Is Appealable on the Sole Issue of Costs Where Such Sole Issue Concerns the Power of the Trial Court to Tax Attorney's Fees As Costs.

Reasons I and II set forth in the petition are inextricable. Likewise, in opposition to these two reasons, consideration of the respondents' position necessarily results in a merger of reasons (1) and (2). Therefore, the argument and citations of authority which appear under (1) above are, in large part, applicable to (2). In that regard, one of the decisions of this Court, cited and quoted in the petitioners' argument, is dispositive of the first and second reasons on both sides. The case is *Newton v. Consolidated Gas Company,* 265 U.S. 78, which is quoted at page 9 of the Petition, as follows:

> "The rule forbidding appeals from decrees for costs only is easily deducible from the discretion in the trial court in fixing them and the better opportunity of that court to exercise that discretion from its greater intimacy with details of the pleadings, hearings, and orders in the case. When the power of the court to

> assess costs against either party is not in dispute, or the mere amount to be fixed is in issue, appeals on such questions alone are not allowed. But the rule is not absolute and should not be enforced to assess as costs against a fund or a party expenditures of a class not legally assessable as such. Where a question of this kind is made, appeals have been allowed."

The respondents contend, in accordance with the doctrine of *Newton,* and as found by the Sixth Circuit Court of Appeals in the case at bar, that attorney's fees are not legally assessable in a case of this kind where the record does not show that the assessed party is guilty of bad faith or of willful, obstinate, obdurate defiance of law (Petition, Appendix C).

3. Attorney's Fees Should Not Be Routinely Awarded in a Case Brought under Title 28 U.S.C.A., Sections 1331 and 1343, but May Be Awarded Where the Record Establishes Bad Faith or Willful, Obstinate, Obdurate Conduct on the Part of the Defendant.

The petition inaccurately implies that the case at bar was brought under the provisions of Title 42 U.S.C.A., Sections 1981, 1982 and 1983. The Complaint specifically relies solely upon Title 28 U.S.CA., Sections 1331 and 1343. These sections are expressive of congressional policy as to monetary allowances, and they do not include attorneys' fees.

Unlike the cases cited by the petitioners, the *Capers* case was not brought as a class action. It did not create a fund. The petitioners admit (*page 11 of Petition*) that Mrs. Capers failed to qualify as a candidate, despite the fact that the filing deadline would be August 18 rather

than the June 29 deadline which she had expected to meet all along.

In *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375 (1970), this Court allowed attorney fees as costs because the expenses petitioners incurred were for the benefit of the corporation and other stockholders. The record of the *Capers* trial discloses no comparable situation in this case, which is confined to the City of Cleveland mayoralty race. As the caption itself shows, the Board of Elections is a *county* board and the assessment of costs against it falls upon the taxpayers of Cuyahoga County, the majority of whom reside outside of the City of Cleveland. The basis of the award in *Mills* was the fact that it resulted in litigation expenses being spread among corporate shareholders who benefited from the litigation. Assuming, arguendo, that other would-be independent candidates were benefited by the action of Mrs. Capers, there is no conceivable way in which assessing her attorney fees as costs can be respread between or among such independent candidates.

Fairly read, it would seem that the petitioners, at this juncture of the appellate proceedings, are contending for a universal rule that successful plaintiffs in cases under Title 28 U.S.C.A. Sections 1331 and 1343, should always have their attorney fees taxed as costs against the defendants therein, regardless of the defendants' lack of bad faith and of willful, obdurate, obstinate conduct. This latter-day assertion is a drastic departure from, and a radical reversal of, the admission made by petitioners' counsel in the trial court, at page 31 of Volume III of the Appendix filed in the Court of Appeals (p. 256 of the entire Appendix):

> "I would agree with Mr. Dowling that before an award of attorney fees can be made, there has to be some

showing that the party on the other side acted in a reprehensible way, that he did something improper or that it was malicious or otherwise—well, improperly motivated. Let's say it that way."

CONCLUSION

Respondents respectfully submit that the Petition for a Writ of Certiorari should be denied for the reason that the decision by the Court of Appeals and the record before it do not present a suitable vehicle for the exercise of this Court's "sound judicial discretion" to review on writ of certiorari, under the considerations expounded by Rule 19 of this Court. Respondents also request the award in their favor of such costs on appeal as are appropriate under the rules of this Court.

Respectfully submitted,

JOHN T. CORRIGAN, *Prosecuting Attorney of Cuyahoga County, Ohio*

JOHN L. DOWLING,

Assistant Prosecuting Attorney of Cuyahoga County, Ohio

Attorneys for Respondents

APPENDIX

TITLE 28, U.S.C.A., SECTION 1331

§ 1331. Federal question; amount in controversy; costs

(a) The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States.

(b) Except when express provision therefor is otherwise made in a statute of the United States, where the plaintiff is finally adjudged to be entitled to recover less than the sum or value of $10,000, computed without regard to any setoff or counterclaim to which the defendant may be adjudged to be entitled, and exclusive of interests and costs, the district court may deny costs to the plaintiff and, in addition, may impose costs on the plaintiff.

TITLE 28, U.S.C.A., SECTION 1343

§ 1343. Civil rights and elective franchise

The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

(1) To recover damages for injury to his person or property, or because of the deprivation of any right or privilege of a citizen of the United States, by any act done in furtherance of any conspiracy mentioned in section 1985 of Title 42;

(2) To recover damages from any person who fails to prevent or to aid in preventing any wrongs mentioned in section 1985 of Title 42 which he had knowledge were about to occur and power to prevent;

(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;

(4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote.

TITLE 42, U.S.C.A., SECTIONS 1981, 1982 AND 1983

§ 1981. Equal rights under the law

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

§ 1982. Property rights of citizens

All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property.

§ 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.